Supreme Court, U.S.
FILED

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No. 98 817

In The

Supreme Court of the United States

October Term, 1998

IN RE: CHARLES A. MUER
ESTATE OF CHARLES A. MUER, DECEASED,
Petitioner,

C.A. MUER CORP.,
Plaintiff,

v.

ROBERT A. KARBEL,
PERSONAL REPRESENTATIVE OF THE ESTATE OF
GEORGE F. DRUMMEY AND LYNNE DRUMMEY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question I:

May a shipowner seek limitation of liability when he is charged not with vicarious liability for the negligence of others, but only for his personal negligence as master of the vessel?

Question II:

When a LOLA petitioner is charged only with active negligence, may the claimant attack petitioner's limitation claim by motion, without first having to first prove negligence in the exoneration portion of the proceedings?

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Estate of Muer v. Karbel*, 146 F3d 410 (6th Cir. 1998) (App. A of Muer's Petition in this case.). The opinions of the district court filed March 14, 1996 (App.B of Muer's Petition) and July 31, 1996 (App.C of Muer's Petition) are not published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 9, 1998. The Court of Appeals denied a timely petition for rehearing on July 16, 1998 (App. D. of Muer's Petition).

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). This is a conditional cross-petition filed timely pursuant to Rule 12(5).

STATUTES INVOLVED

46 U.S.C. §183

§ 183. Amount of liability

(a) Privity or knowledge of owner; limitation

The liability of the owner of any vessel, whether American or

foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) Seagoing vessels; losses not covered in full

In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) Tonnage of seagoing vessels

For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage

without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) Loss of life or bodily injury arising on distinct occasions

The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) Privity imputed to owner

In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) "Seagoing vessel" defined

As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders,

self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in § 188 of this title.

(g) Vicarious liability for medical malpractice at shoreside facilities; statutory limitations

In a suit by any person in which the operator or owner of a vessel or employer of a crewmember is claimed to have vicarious liability for medical malpractice with regard to a crewmember occurring at a shoreside facility, and to the extent the damages resulted from the conduct of any shoreside doctor, hospital, medical facility, or other health care provider, such operator, owner, or employer shall be entitled to rely upon any and all statutory limitations of liability applicable to the doctor, hospital, medical facility, or other health care provider in the State of the United States in which the shoreside medical care was provided.

46 U.S.C. §185

§ 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant

shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. §187

§ 187. Remedies reserved

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board

any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

STATEMENT OF THE CASE

A. Introduction

The Limitation of Liability Act, 46 U.S.C. §183 allows a ship owner to limit his liability in the event of mishap to the value of his ship and its cargo. To do so, he must establish freedom from any personal negligence in the matter – what the statute calls "knowledge or privity". The statute was passed over a hundred years ago to afford to our then-infant shipping industry the same protections offered their counterparts by foreign governments. Initially construed liberally in favor of shipowners[1], it has more recently been labeled "hopelessly anachronistic[2]" and "due for a general

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1 *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 3 S.Ct. 379, 27 L. Ed. 1038 (1883); *Richardson v. Harmon*, 222 U.S. 96, 32 S.Ct. 27, 56 L. Ed. 110 (1911).

2 *University of Texas Medical Branch at Galveston v. United States*, 557 F2d 438, 441 (5th Cir.1977), *cert. denied*, 439

overhaul[2]." While it has been rendered vestigial by the emergence of insurance and limitation of liability through the corporate form, it's essential features have nonetheless remained untouched by Congress since its original enactment. Even personal pleasure craft, including jet skis[3], have found safe harbor in LOLA, despite widespread recognition[4] that the original purpose of the statute - to encourage investment in shipbuilding and shipping generally, is hardly served by the inclusion of such vessels. However broad the range of vessels harbored under LOLA, one aspect of the statute is undeniable: it is a protection against vicarious liability only, and only then for liability above the salvage value of the vessel and its freight[5]. One would think that if an owner is not charged with vicarious liability, but is instead sued only for active negligence, LOLA should afford neither a substantive remedy, nor a vehicle for circumventing a plaintiff's right to proceed outside the confines of admiralty

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U.S. 820, 99 S.Ct. 84, 58 L. Ed. 2d 111 (1978).

3 *Keys Jet Ski, Inc. v. Kays,* 893 F2d 1225 (11th Cir.1990);

4 *Keys Jet Ski, Inc. v. Kays,* 893 F2d 1225 (11th Cir.1990); *Gibboney v. Wright,* 517 F2d 1054, 1057 (5th Cir.1975).

5 46 U.S.C §183(a) The liability of the owner ... for any loss, damage, or injury ...done, occasioned, or incurred, *without the privity or knowledge of such owner* or owners, shall not...*exceed the amount or value of the interest of such owner in such vessel,* and her freight then pending. (emphasis added)

with its denial of jury trial. However, the procedure which has grown up around LOLA has made it possible in some district courts[6], as well as in the Sixth[7] and Eleventh[8] circuits, for an owner, sued in state court only for active negligence, to petition under LOLA. He then enjoins the state action and has his exoneration claim adjudicated in an admiralty court without a jury.[9]

In such cases, limitation can never occur. If plaintiff proves active negligence, the petitioner has failed to carry his burden of showing that any negligence was outside his knowledge or privity. On the other hand, if the plaintiff fails in his burden, the defendant faces no liability at all, making limitation superfluous. Nonetheless, in courtrooms where an insubstantial claim for limitation irrevocably secures admiralty jurisdiction over the exoneration issue, limitation as

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6 e.g. *Complaint of Cirigliano*, 708 F. Supp. 101 (D.N.J. 1989); *Polly v. Estate of Carlson*, 859 F. Supp. 270 (E.D. Mich 1994), *Suzuki of Orange Park, Inc. v. Shubert*, 86 F3d 1060 (11th Cir. 1996),

7 *Muer v. Karbel 146* F3d 410 (6th Cir. 1998) (this case)

8 *Petition of M/V Sunshine, II*, 808 F2d 762, 764 (11th Cir. 1987).

9 Certain exceptions to LOLA such as the single claim or the claim for an amount at or below the value of the vessel may permit a plaintiff to escape LOLA but this is by no means assured.

a substantive right may ultimately be denied to the guilty; but the advantage of depriving the claimant of his right to jury trial is shared by the guilty and innocent in equal measure.

The reason why this is so unjust is that, while exoneration becomes the sole issue in these situations, LOLA does not provide for exoneration. It is relief fashioned by the courts for the same reason that ancillary and pendent jurisdiction (now codified as supplemental jurisdiction[10]) were judicially created: to allow parties *otherwise properly before the court* to obtain complete relief. Without such added jurisdiction, the LOLA court, finding no basis for limitation after thorough examination of all the facts of the case, would be compelled to dismiss the petition, leaving whomever ought to have prevailed on the underlying negligence issue without a judgment. The value of federal jurisdiction to the litigants would be greatly diminished and judicial economy disserved.

However, while the federal courts have been vigilant in the area of pendent, ancillary and supplemental jurisdiction to prevent insubstantial claims from becoming false passports to federal court, the opposite has been true under LOLA. The mere incantation of the words of the statute has become sufficient to initiate and carry through to conclusion a proceeding, the sole objective of which is to pursue the judicially created remedy of exoneration, not statutory

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[10] 28 U.S.C. §1367

limitation. The result is especially perverse when the procedure is being invoked, as it is here, in a pleasure boat situation far from the intendment of Congress when LOLA was enacted[11].

Examination of the cases will show that the courts that have refused to consider potentially fatal defects in the limitation portions of a LOLA petition, prior to trial on exoneration, have done so because they assume that exoneration is an independent right, on an equal footing with and in no way contingent upon there being a good faith claim for limitation[12]. This view is nowhere supported in the statute or in authority from this Court.

This case presents an excellent vehicle for correcting this evolutionary deformity in the maritime law.

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11 note 4, *ante*

12 For example, in this case the Sixth Circuit said: "the appellant also seems to make an argument that exoneration is not available to the petitioner-appellee in its LOLA action. This argument is meritless. Under Supplemental Rule F Rules for Certain Admiralty and Maritime Claims, a shipowner-petitioner "may demand exoneration from as well as limitation of liability" and "shippers routinely seek exoneration and limitation of liability in the alternative." citing *Texaco, Inc. v. Williams*, 47 F3d 765, 769, n.19 (5th Cir.1995). 146 F3d 410, n. 3.

B. Factual Background

Paragraph one below is a restatement of the facts set forth in the claimant's Brief in Opposition to the Petition for Writ of Certiorari. It is restated herein for the convenience of the court. Paragraph two is material not stated elsewhere by the parties.

1. The final voyage of the Muer vessel (named "Charley's Crab") began on the morning of March 12, 1993. The vessel was captained by Mr. Charles A. Muer. On board also were his wife, Betty, and appellant's decedents, George and Lynne Drummey. Although all had sailed together in the past, Mr. Muer was by far the more experienced sailor and clearly captain of the vessel. Weather reports indicated that the vessel would encounter high seas and storms coming into Florida. Nonetheless, the vessel proceeded toward the Florida Coast. It was sighted and photographed at approximately 2:45 p.m. on March 12th by a government surveillance plane but was never seen again. At 4:30 a.m. on March 13th, a 911 telephone call was made from a cellular phone on Charley's Crab and received at a cellular tower in Lantana, Florida just a few miles south of the vessel's intended destination at the Lake Worth Inlet on the Coast of Florida. The call lasted only a few seconds and a voice connection was never made before the call terminated. Because no one on shore had been informed of the intended time of arrival, it was not

appreciated for two more days that the vessel was overdue. Consequently, a coordinated search was not initiated until Monday, March 16th. This may explain why neither the vessel, its passengers nor wreckage was ever found.

2. The Complaint filed in this matter alleged negligence strictly on the part of Charles A. Muer in his operation of the vessel and its unseaworthiness at his hands. Vicarious liability was also alleged against the corporation as owner. However, the corporation was dismissed by settlement prior to the court's order of July 31, 1996. (App. C of Muer's Petition in this case). Apart from the fact that the corporation was dismissed before the court's rulings, Charles A. Muer was the principal shareholder, chief operating officer and only officer or managing agent who had anything to do with Charley's Crab prior to its loss.[13]

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[13] The significance of this has to do with whether the corporation would have been entitled to claim limitation even in the event that the alleged owner *pro hac vice*, Charles A. Muer, could not. Because knowledge of high-ranking corporate managers in charge of the phase of the business wherein the accident occured is imputed to the corporate owner, there was no separate defense of knowledge or privity available to the corporation. See *Craig v. Contintental Ins. Co.*, 141 U.S. 638, 646, 12 S. Ct. 97, 99, 35 L.Ed. 886 (1891); *Petition of Kinsman Transit Co.*, 338 F2d 708 (2d Cir. 1964), cert den 380 U.S. 944 (1965); *The Erie Lighter 108*, 254 F. 490, 494 (D.N.J.

REASONS FOR GRANTING THE CROSS-PETITION

As indicated in the Introduction, this case has all the ingredients for action by this Court. It involves a recurring question of the limits of federal jurisdiction, a clear split among the circuit courts[14], and another facet of the ongoing tension between admiralty and saving to suitors jurisdiction.

Further, if the claimant's analysis is correct, then the Sixth Circuit in this case and other courts taking a similar view, have enlarged LOLA jurisdiction beyond Congress's intention. While it may be up to Congress to correct the distortions it creates in a harmonious and balanced deployment of judicial power, when courts create such anomalies, it is only right that courts - ultimately this Court - correct them.

1918); *Penzoil Producing Co. v. Offshore Express, Inc.*, 943 F2d 1465 (5th Cir. 1991).

[14] *Petition of M/V Sunshine, II,* 808 F2d 762 (11th Cir. 1987); *Muer v. Karbel,* 146 F3d 410 (1998), (two-step analysis always required irrespective of the nature of the allegations against the petitioner); *Joyce v. Joyce*, 975 F2d 379 (7th Cir. 1992); *Fecht v. Makowski*, 406 F2d 721 (5th Cir. 1969) (LOLA may not be invoked by a petitioner who is charged solely with his own negligence.)

I.

WHEN A SHIPOWNER IS CHARGED NOT WITH VICARIOUS LIABILITY FOR THE NEGLIGENCE OF OTHERS, BUT ONLY FOR HIS PERSONAL NEGLIGENCE AS MASTER OF THE VESSEL, HE MAY NOT SEEK LIMITATION OF LIABILITY

We claim that an owner not charged with vicarious liability under LOLA cannot claim exoneration. The correctness of our position depends upon our demonstrating that exoneration was created by the courts to aid, not substitute for, LOLA jurisdiction. We therefore begin with an analysis of the early case law which shows this.

A. A BRIEF REVIEW OF THE HISTORY OF THE EXONERATION REMEDY UNDER LOLA

One of the early cases to interpret LOLA was *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 3 S.Ct. 379, 27 L Ed 1038 (1883). The issue in that case was whether the federal court could enjoin a state proceeding on the same claim which had been the subject of a LOLA petition. Congress had prohibited against such injunctions in the Judiciary Act of 1793 (1 St. at Large, 335). The Court

determined that, LOLA having been passed subsequent to the Judiciary Act, and providing in §185 that "[u]pon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease", congress had impliedly modified the Judiciary Act. Stating that it was the duty of the courts to interpret the statute not "with a tight and grudging hand" but rather "with the view of giving to ship-owners the full benefit of the immunities intended to be secured by it..."[15], the Court held that the statute would never be of value if the courts were unable to enjoin all other state and federal proceedings and, in a multi-claim case, to administer concursus as admiralty had traditionally done. The Supreme Court thus reversed the Massachusetts Supreme Court which had attempted to give effect to its judgment in favor of the claimant, notwithstanding that the admiralty court had exonerated the petitioner[16].

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[15] *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 589 (1883).

[16] Notably, the court was unwilling to assume that the neglect which had prevented exoneration in that case would be tantamount to knowledge or privity precluding limitation. The phrase "knowledge or privity" had not to yet been defined. Since the time of *Coryell v. Phipps*, 317 U.S. 406, 411 (1943), "in the case to of individual owners, it has been commonly held or declared that privity as used in the

The court made reference to rules of procedure which had been promulgated by the court in 13 Wall. xii., xiii. The forerunner of Supplemental Rule F, these rules provided not only for limitation of liability, but joinder of the exoneration claim as well. However, just as Supplemental Rule F requires that a LOLA complaint set forth a cause of action for limitation prior to joining a claim for exoneration[17], the *Hill* court's description of the original rules,[18] though not quite so clear, suggests the same requirement.

Following *Hill,* courts were faced with two mirror-image situations testing the limits of the court's jurisdiction. In both, the admiralty court had determined that the acts complained of were within the knowledge and privity of the owners. In the first case, *84 H; Appeal of Bouker*

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statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury."

[17] Supplemental Rule F. Limitation of Liability

...

(2) Complaint. The complaint *shall* set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint *may* demand exoneration from as well as limitation of liability. (emphasis added)

[18] *Providence N.Y.S.S. Co. v. Hill Mfg. Co.,* 109 U.S. 578, 591-592

Contracting Co., 296 F. 427 (2nd Cir. 1923) the testimony clearly showed that the managing agent was intimately involved in the circumstances of the occurrence. However, the trial court found no negligence. Believing that a finding of knowledge or privity ended the inquiry, the court had dismissed the petition, leaving the innocent owner without a judgment with which he could defend in a subsequent action. Reversing, the Second Circuit used language describing the now familiar two-step analysis:

> And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether the loss or damage was occasioned or incurred without the "privity or knowledge" of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and the matter ends. If, on the other hand, liability is found and loss or damage is shown, and was not occasioned or incurred with "privity or knowledge" of the shipowner, the limitation of liability should be decreed. 296 F.2d 427, 431-432.

Read in a vacuum, *Bouker* would seem to support the view that irrespective of knowledge or privity, the shipowner is entitled to a full trial on exoneration. However, there had apparently been no pre-trial attack upon the denial of knowledge or privity. The facts concerning knowledge and privity did not come out until trial. The action was against a corporation and as the court noted from the opinion of the trial court below:

> The company, however, knew all about the method of conducting business at the "dump." Indeed "privity or knowledge" was admitted by the general superintendent *when testifying*. (emphasis added) 296 F. 427, 432.

Thus, while clearly establishing the ancillary power of the admiralty court to grant exoneration when the facts bear it out in a trial on limitation, *Bouker* does not help with the question of what the court should do if knowledge or privity is apparent either from the pleadings or at an early stage of factual development in the case.

Four years later the Supreme Court addressed the other side of the coin in *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207, 47 S. Ct. 357, 71 L. Ed. 612 (1927). Having enjoined the claimant's state case, the LOLA court found negligence and that the shipowner had

knowledge or privity. The resourceful petitioner, arguing that a finding of knowledge or privity ended the inquiry, claimed that the admiralty court then had no power to award a judgment against him for damages; whereupon the Supreme Court held:

> Surely the admiralty court, in view of the large powers intended to be given it in such a proceeding, is not so helpless as this. ... It would be most inequitable if parties and claimants brought in against their will, and prevented from establishing their claims in other courts, should be unable to perfect a remedy in this proceeding promptly, and should be delayed, until after the possible insolvency of the petitioner, to seek a complete remedy in another court, solely because the owner cannot make his case of personal immunity.
>
> ... [T]his court has clearly held, it necessarily follows, as incidental to that power, that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res*, and by judgments *in personam* for deficiencies against the owner, if not released by virtue of the statute. 273 U.S. 207, 216-217

While these cases, and the *Hill* case before them, made clear that an admiralty court acting under LOLA had the power to grant complete relief, either in favor of the petitioner or against him, nothing in these cases suggests that exoneration was intended by Congress to be a remedy which could be sought without a legitimate argument for limitation.

B. THE STATUTE ITSELF SUGGESTS NO PROTECTION WAS INTENDED FOR THE OWNER CHARGED WITH HIS OWN NEGLIGENCE

LOLA indicates a congressional intent to leave negligent owners outside the protections of the statute. To begin with, the statute simply does not speak of exoneration: only limitation for those owners who establish freedom from knowledge or privity. Second, Congress emphasized the fact that it had no desire to offer protection to a negligent master or crew in 46 U.S.C. § 187, which states:

> **§ 187. Remedies reserved**
>
> Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers,

> or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

Of significance is the fact that §185 is among the provisions which §187 says must not "... take away or affect the remedy to which any party may be entitled...." . Section 185 is the procedural provision which authorizes the filing of the petition and the injunction against other suits. This goes far in rebutting an argument that the word "remedy" is limited to a substantive remedy or limitation within the admiralty court. The more logical reading is that coincidental ownership of the vessel by the party charged with active negligence does not entitle him to even initiate a LOLA proceeding.

This is entirely consistent with the numerous cases which have said that the exclusive purpose of LOLA is to protect:

> . . . the physically remote owner who, after the ship breaks ground, has no effective control over its waterborne servants. *Tittle v. Aldacosta,* 544 F2d 752, 756, (5th Cir. 1977); *Complaint of Armatur,* 710 F.Supp. 390 (D.Puerto Rico 1988); *Complaint of G & G Shipping Co. Ltd.*, 767 F.Supp. 398 (D.Puerto Rico 1991).

> It is evident that the legislation of Congress was to enable the vessel owner to limit his risk to his interest in the ship in respect to all claims arising out of the conduct of the master and crew and for acts done without his privity or knowledge, while leaving him liable for his own fault, neglect, and contracts. *The 84-H; Appeal of Bouker Contracting Co.*, 296 F. 427, 431.

C. SUPREME COURT AUTHORITY NEGATES THE ASSUMPTION THAT EXONERATION MAY BE SOUGHT OUTSIDE THE CONTEXT OF A GOOD FAITH LIMITATION CLAIM.

Two Supreme Court cases also suggest that the rights of the state claimant do not always give way to the LOLA

petitioner. The first is *Langnes v. Green,* 282 U.S. 531; 51 S. Ct. 243; 75 L.Ed. 520 (1931). *Langnes* clearly established that a claimant in state court, proceeding outside admiralty under the saving to suitors clause, has a valuable interest in trying his action in the state forum. So long as the need for concursus this is absent, even a proper LOLA proceeding must be accommodated to the claimant's right to jury trial. Under *Langnes* and its progeny[19] a claimant willing to make proper stipulations to preserve fee power of the LOLA court to determine limitation issues following a possible judgment in state court, may proceed there to judgment.

The more important case for our purposes is *Lake Tankers Corp. v. Henn,* 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed. .2d 1246 (1957). Lake tankers involve the situation in which the plaintiff had initiated her action in the state court for an amount exceeding the value of its vessel and its freight. Following the filing of a LOLA petitioner, she stipulated to reduce her claim to the value of the vessel so as to return to state court. The petitioner wished to remain in admiralty, irrespective of the fact that the stipulations heady effectively eliminated any risk of personal liability. Considering that the

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[19] *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F2d 750 (2d Cir. 1988); *Gorman v. Cerasia,* 2 F3d 519 (3d Cir. 1993); *In re Mucho K., Inc.*, 578 F2d 1156 (5th Cir. 1978); *In re Zapata Gulf Marine Corp.*, 787 F. Supp. 612 (E.D. La. 1992).

petitioner had posted $283, 542.21 in bonds, the amount at stake with clearly not trivial and well worth the petitioner's continuing efforts to obtain exoneration. However the Court affirmed dismissal of the petition stating first that the stipulations assured that there w\ould be no personal liability above the fund; and then:

> For us to expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it. The shipowner's right to limit liability is not so boundless. The Act is not one of immunity from liability *but of limitation of it and we read no other privilege for the shipowner into its language over and above that granting him limited liability.*
>
> ...
>
> It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus, or railroad company. None of them can

> force a damage claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions. *The Act, as we have said, was not adopted to insulate shipowners from liability but merely to limit it to the value of the vessel and the pending freight.* 354 U.S. 147, 152-153

Since exoneration releases the petitioner's bond, which, as in *Henn,* may be substantial, the exoneration remedy has value apart from limitation. Thus, if exoneration were a right independent of limitation, the *Henn* decision could not be justified.

Against this backdrop, the cases in which the the petitioner is charged only with personal negligence have split. At the circuit level, *Joyce v. Joyce*, 975 F2d 379 (7th Cir. 1992) and *Fecht v. Makowski,* 406 F2d 721 (5th Cir. 1969) have disallowed the petition. This case and *Petition of M/V Sunshine II*, have refused to consider whether the petitioner would ever be able to actually make out the claim for limitation prior to engaging the first prong of the two-step analysis.

Joyce involved a negligent entrustment claim against the petitioner who was not the operator of the vessel at the time that the accident causing injury to claimant occurred. The court below had dismissed the petition for want to subject matter jurisdiction, believing that a threshold inability to make a claim for limitation would undercut maritime jurisdiction altogether. The Seventh Circuit, while ultimately affirming the dismissal, did not do so on jurisdictional grounds. Citing the definitions of privity taken from *Coryell*[20], and other sources, all emphasizing the personal nature of the owner's involvement, the court held that negligent entrustment was exclusively a theory based upon the direct knowledge of the owner. As the court put it: "if a shipowner knows enough to be liable for negligent entrustment, he knows too much to be eligible for limited liability under the Act.[21] "

The cases which have agreed that a petitioner with no ability to divorce himself from knowledge or privity of his own actions should be unable to pursue a limitation petition

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[20] Coryell v. Phipps, 317 U.S. 406, 411, 63 S. Ct. 291, 87 L.Ed. 363 (1943).

[21] 975 F2d 379, 385

have had no trouble using Rule 56 analysis to analyze the pleadings.[22]

However, analysis of the cases turning back Rule 56 attacks and which uphold a petitioner's right to claim exoneration even when he is not being charged with any negligence but his own, quite clearly do so on the basis that a plausible claim for limitation is simply not necessary to sustain the exoneration portion of the petition. For example, in the District Court case of *Polly v. Carlson*, 859 F. Supp. 270 (E.D. Mich 1994), the District Court conceded that it would be virtually impossible for the owner to lose on the negligence portion of his claim and yet prevail on limitation. Nonetheless, the court stated:

> There is some case law supporting *Polly's position. See, e.g. In re Ingoglia*, 723 F.Supp. 512, 515 (C.D.Cal. 1989) . . . *In re Follett*, 172 F.Supp. 304, 305 (D.Tex. 1958) . . . I nevertheless reject *Polly's* proposed rule because it would prevent owners from asserting Limitation of Liability Act (LOLA) 46 U.S.C. § 181 even in situations where the evidence reveals their conduct was in all respects prudent. See, e.g. *Petition of M/V Sunshine, II*, 808 F2d 762, 765 (11th Cir. 1987) (remaining citations omitted).

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[22] *Fecht v. Makowski*, 406 F2d 721 (5th Cir. 1969); *Joyce v. Joyce*, 975 F2d 379 (7th Cir. 1992)

The *Polly* court was clearly focused on a perceived right to exoneration irrespective of knowledge or privity.

D. EXONERATION SHOULD BE SUBJECT TO THE SAME LIMITATIONS ON ITS EXERCISE AS ARE OTHER FORMS OF SUPPLEMENTAL JURISDICTION

The additional jurisdiction created by the courts to grant the exoneration remedy (or a judgment to a claimant proving negligence), analogizes to pendent and ancillary jurisdiction, now substantially codified in 28 U.S.C. §1367. Prior to codification, ancillary and pendent jurisdiction had two features in common with the additional jurisdiction created by the court to deal with LOLA cases. First, such jurisdiction was not expressly provided for by statute; second, the exercise of such jurisdiction was deemed to be impliedly authorized by constitution and statute on the theory that, without it, the express jurisdictional grants could not be effectively exercised. *See, United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S. Ct. 1130, 16 L Ed 2d 218 (1966).

In recognition of the fact that what Congress had not expressly authorized needed to be cautiously asserted, the courts established rules and guidelines to assure that such judicially enhanced jurisdiction would remain servient to the statutory power it was designed to effectuate. Thus, the additional claims not only must have arisen from a common

core of operative facts, but adjudication of the additional claims should not call upon the court to clash with the exercise of jurisdiction by other courts having a special interest in the subject matter and, important for this case, the additional claims should not predominate over the claims authorized by statute to be in federal court.

If the supplemental jurisdiction standards were applied to the judicially created jurisdiction necessary to grant exoneration, exoneration claims would not remain in federal court when appended to a limitation claim that involves direct, rather than vicarious liabilty, as no limitation claim exists for direct liability against owners. At a minimum, the court would pay close attention to the legal validity and factual substance of the statutory claim before being willing to maintain the appended claim through trial. *Compare, Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 fn 7, 108 S. Ct. 614, 98 L.Ed. 2d 750 (1987), where the federal question upon which jurisdiction is based is dismissed in the "early stages" of a proceeding, the court should not exercise supplemental jurisdiction, especially given interests of comity. However, that has not been the practice in LOLA cases. Instead, the exoneration remedy has become the center of gravity, with the LOLA claim being, if anything, the forgotten satellite.

II.

ASSUMING THAT EXONERATION IS NOT AVAILABLE TO A PETITIONER WHO CANNOT MAKE A GOOD FAITH CLAIM FOR LIMITATION OF VICARIOUS LIABILITY, A CLAIMANT MAY ATTACK KNOWLEDGE OR PRIVITY WITHOUT FIRST HAVING TO PROVE NEGLIGENCE IN THE EXONERATION PORTION OF THE PROCEEDINGS.

There is no reason why Rule 56 and 12(b)(6) attacks upon limitation claims should not be allowed as they are in all other cases.

The LOLA cause of action, like any other, contains elements; the statute clearly identifies them:

1. The petitioner must be an owner (or by case law development, an owner *pro hac vice*) -- §185

2. he must have filed within six (6) months of being notified in writing of a claim against him; – §185

3. a bond or other satisfactory security must be lodged with the court in an amount equal to or greater than the salvage value of the vessel and its freight pending at the time of the incident. – §185

4. he must be seeking to limit liability for negligence or unseaworthiness outside his privity or knowledge – §183

Our concern here is with element 4. In any other claim of any other kind, the failure to plead an element subjects the pleading to attack under Rule 12(b)(6) or Rule 56 and the failure to be able to make out a *prima facie* case on an element, after a reasonable time for discovery, subjects the claim to a Rule 56 attack according to the standards defined in *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

There is no logical reason why a LOLA claim should be insulated from early disposition by motion when it cannot ultimately be anything more than an excuse for federal jurisdiction.

CONCLUSION AND RELIEF SOUGHT

By a slow process of accretion, the priority of relief intended by congress and the early cases has reversed itself. Limitation has become the little noticed caboose behind the exoneration engine. If there is one case which states so clearly why this development should be undone, it is *Lake Tankers Corp. v. Henn,* 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed. 2d 1246 (1957, which spoke eloquently in terms of offensive weapons and the unfair advantage that a LOLA petitioner gains when the jurisdictional limits of LOLA are overstretched.

Recognizing that this cross-petition will not be granted unless the original petition is, we repeat the request made in our brief in opposition to the Muer petition. If the Muer petition is to be granted, we request that the Karbel petition be granted as well. We believe that the importance of the issues presented herein eclipses that of the Muer petition.

Respectfully submitted,

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